COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

SUFFOLK, SS

SJC-09689

ALLIANCE TO PROTECT NANTUCKET SOUND, INC.,

Plaintiff-Appellant,

v.

ENERGY FACILITIES SITING BOARD OF THE COMMONWEALTH OF MASSACHUSETTS,

Defendant-Appellee.

On Reservation and Report From
the Supreme Judicial Court
for Suffolk County

BRIEF FOR APPELLANT ALLIANCE TO PROTECT NANTUCKET SOUND, INC.

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Statement Of The Issues Presented For Review

1. Did the Massachusetts Energy Facilities Siting Board ("EFSB" or "Board") violate the Alliance's due process rights, as guaranteed in G.L. c. 30A, § 11(1), by announcing and applying a new standard for determining need, one of the critical issues in the case, more than six months after the record was closed?

2. Did the EFSB violate its statutory duties by approving the proposed project despite finding that Applicants had not shown the project to be needed, and by improperly delegating to others its duty to review the need for a proposed energy facility?

3. A. Did the EFSB abuse its discretion by denying the Alliance's motion to reopen the record to include the Draft Environmental Impact Report/Environmental Impact Statement for the project?

B. Did the EFSB err in failing to require Cape Wind to produce the financial information specified in G.L. c. 164, § 69J?

Statement Of The Case

This case began with the filing by Cape Wind Associates, LLC ("Cape Wind"), and Commonwealth Electric Company, d/b/a NSTAR Electric ("NSTAR")

(collectively "Applicants") of a joint petition ("Petition" or "§ 69J Petition") with the Massachusetts Energy Facilities Siting Board on September 17, 2002, pursuant to G.L. c. 164, § 69J, for approval of their plan to build, operate, and maintain transmission lines to interconnect a proposed offshore wind energy project ("wind project" or "project") that would be built in Nantucket Sound. App. 1-213. Applicants also filed a petition with the Massachusetts Department of Telecommunications and Energy ("DTE" or "Department") for approval of the transmission facility pursuant to G.L. c. 164, § 72 ("§ 72 Petition"). On September 27, 2002, the DTE Chairman referred the § 72 Petition to the EFSB to be consolidated with the Board's review pursuant to § 69J. App. 214-15.

Between July 29 and October 21, 2003, the EFSB held 21 days of evidentiary hearings. App. 1319-2073. The parties filed initial and reply briefs on November 29 and December 9, 2003. App. 756-1025; 1026-1097; 1176-1256; 1257-1313. On July 2, 2004, the EFSB issued its Tentative Decision conditionally approving the transmission lines. App. 2104-2304. The Board held public meetings regarding the project on November 30,

2004 and May 10, 2005, and issued its Final Decision on May 11, 2005. App. 2074-2103; 2305-2410. The Alliance appealed from the Final Decision, pursuant to G.L. c. 25, § 5, and G.L. c. 64, § 69P, on June 7, 2005.

Statement Of Facts

The project proposed by Cape Wind would be made up of several components. Electricity would be produced by 130 wind turbines, which would be sited on Horseshoe Shoal, a shallow area in Nantucket Sound. App. 12; 2318. The wind turbines would be connected by undersea cables to a platform, also located on Horseshoe Shoal, which would house an electrical transformer. App. 10; 2318. The platform would be connected to the mainland by two parallel electrical circuits, with each circuit consisting of two cables, for a total of four. App. 14-15; 2318. Each circuit would be buried in its own undersea trench, about 20 feet apart. App. 2318. At landfall, both circuits would feed into a single underground duct bank for the remainder of the route, which would terminate at a utility switching station in Barnstable. App. 19; 2318-19.

The wind turbines, the platform, the cables

connecting the wind turbines to the platform, and about half of the 12 mile undersea portion of the transmission lines would be located in a part of Nantucket Sound that is outside the boundaries of the Commonwealth, and is subject only to federal jurisdiction. App. 11; 2318. The other half of the undersea portion of the transmission lines, and the segment from landfall to the utility switching station, would lie within the Commonwealth. App. 11-12. (The terms "transmission lines" and "cables" will refer to the segment of the cables that lies within Massachusetts.)

The EFSB has jurisdiction over the portion of the cables that would lie within the state. Pursuant to G.L. c. 164, § 69H, the Board "shall review the need for, cost of, and environmental impacts of transmission lines," to "provide a reliable energy supply for the commonwealth with a minimum impact on the environment at the lowest possible cost." The part of the project that would lie in Nantucket Sound is subject to the jurisdiction of federal permitting agencies. The lead agency at the time the Petition was filed was the United States Army Corps of Engineers ("ACOE"), pursuant to Section 10 of the Federal Rivers

and Harbors Act, 33 U.S.C. § 403 (2006) ("Sec. 10 Permit"). Pursuant to § 388 of the Federal Energy Policy Act of 2005, the lead agency for review of the § 10 Permit is now the Minerals Management Service ("MMS"), a division of the United States Department of the Interior.

In the Petition, Applicants stated that the standard for determining the need for the cables should be that used by the Board in two cases that involved jurisdictional transmission facilities interconnecting non-jurisdictional generating plants, Turners Falls Limited Partnership, 18 DOMSC 141 (1988) ("Turners Falls") and Massachusetts Electric Company/New England Power Company, 18 DOMSC 383 (1989) ("MECo/NEPCo"). App. 39-41. (This standard will be referred to henceforth as the "Turner Falls standard".) In those cases, the proposed power plant was non-jurisdictional because its capacity was less than 100 megawatts, the threshold for Board review. Under the Turners Falls standard, Applicants could show a need for the transmission lines by showing that the power they would carry was needed on economic efficiency, reliability, or environmental grounds. Turners Falls at 154-55; MECo/NEPCo at 393. Under this

standard, the Board "must, to some degree, review various aspects of the non-jurisdictional . . . plant." Turners Falls at 154-55. App. 38-41.

In the Petition, Applicants cited characteristics of the wind project itself in arguing that the cables were needed under the Turners Falls standard. App. 42-67. The Petition described the environmental and economic benefits Applicants claimed would be brought by the wind project, including the absence of "any perceptible air emissions, water impacts, noise impacts or other environmental effects." App. 63-64.

The EFSB review of the § 72 Petition is subject to the Massachusetts Environmental Policy Act, G.L. c. 30, §§ 61 et seq. ("MEPA"), and requires the preparation and approval of an environmental impact report ("EIR"). The ACOE's review of the Sec. 10 Permit application is subject to the National Environmental Policy Act, 42 U.S.C. §§ 4321 et seq. ("NEPA"), and requires the preparation and approval of an environmental impact statement ("EIS"). MMS review of the proposed project is also subject to NEPA review, and as the authorizing agency, MMS has become the lead agency. It is now conducting its own, independent EIS. See 71 Fed. Reg. 26559 (May 5, 2006).

Cape Wind agreed to a consolidated MEPA/NEPA process; a single document would serve as the EIS and EIR in both its draft and final forms. App. 306; 2119; 2320.

In March 2003, the Alliance propounded discovery seeking information related to the wind project generally, including its potential reliability, economic, and environmental impacts. App. 714-755. Applicants objected to these requests on the grounds that the project would be "located in waters that are subject to federal jurisdiction." App. 714-748. Cape Wind provided some information, but noted that information regarding the potential impacts of the project was not yet available, and would be addressed in the Draft EIR/Draft EIS ("DEIR/DEIS") "in the near future." App. 741-753.

In May 2003, the Alliance moved to suspend the procedural schedule on the grounds that the continued absence of the DEIR/DEIS severely limited its "ability to prepare meaningful and complete testimony for its direct case." App. 219-234. The motion noted the unique posture of the case (a jurisdictional cable that would interconnect a power plant of more than 100 megawatts that claimed to be beyond the Board's jurisdiction), and that it was based on the Turners

Falls standard for determining need, as cited in the Petition. App. 221.

In response, Cape Wind reiterated its view that information about the potential impacts of the project were beyond the Board's jurisdiction. App. 241. The Alliance replied that Cape Wind was backing away from the Turners Falls standard, and urged the Board to address immediately any confusion regarding the appropriate standard for determining need, stating that "[a]ny doubt about the standards of review being applied as the parties go forward will only lead to costly and confusing evidentiary and procedural chaos." App. 252-254. On June 6, 2003, the Board's Presiding Officer denied the Alliance's Motion, finding that the project would be "reviewed in the context of existing Siting Board precedent," which was "available to the intervenors, and to the public generally, for review," making briefing on the standard of review unnecessary. App. 275.

On June 20, 2003, the Alliance submitted pre-filed direct testimony of five witnesses regarding the reliability and economic need for the project under the Turner Falls standard; the potential impacts of the wind turbines on birds, bird habitats, and

fisheries; the acoustical impacts of the project; and the potential benthic impacts of the cables. App. 5576-5756. Cape Wind moved to strike much of the Alliance's direct case on the grounds that the testimony related "exclusively" to the project rather than the proposed transmission lines and, thus, was "outside of the jurisdictional review of the [Board]." App. 278. The Alliance responded that the proffered evidence was relevant under the Turners Falls standard for assessing the need for the specific power that would be generated by the wind project. App. 289-294. The Presiding Officer denied the Motion to Strike, finding that certain characteristics of the non-jurisdictional portions of the wind project would be relevant to the Board's inquiry, and could also support the Alliance's interpretation of the "environmental need" prong of the Turners Falls standard. App. 304.8. The ruling gave no indication that the EFSB might apply a new standard of review.

On October 28, 2003, the Presiding Officer issued briefing questions relating to the continued viability of the Turners Falls standard, and what other standards the Board might consider in its place. App. 6142. In response, the Alliance argued that the

Board should adopt a modified version of the Turners Falls standard of review, in which the Board would consider whether a project's negative impacts on reliability, economic efficiency, or the environment might outweigh positive impacts in other areas. App. 1088-89; 1310-13. Applicants argued that the Board should either keep the Turners Falls standard, or adopt a new standard in which the inability of the existing transmission system to interconnect a proposed plant alone would be sufficient evidence of need pursuant to § 69J. App. 1009-10.

The Presiding Officer closed the record on December 18, 2003, at which point it did not contain the DEIR/DEIS or a draft or final System Impact Study, which was conducted by ISO New England and is required to assess the impacts of the proposed introduction of power to the regional electric system. App. 305; 2134.

In the Tentative Decision, the Board found that the Turners Falls standard of review was no longer viable, given the changes in the industry and in the Board's own statutory authority since that line of cases had been decided. App. 2127-31. The Board found that, in this case and henceforth, an applicant must demonstrate the need for a proposed transmission line

to interconnect a generating plant (regardless of the size or location of the plant) by showing that (1) the existing transmission system is inadequate to interconnect the new or expanded generator, and (2) the new or expanded generator is likely to be available to contribute to the regional energy supply. App. 2131. For a non-jurisdictional generator, the availability showing "may be made on a case-by-case basis based on indicators of project progress (E.g., progress in permitting or in obtaining project financing)." App. 2131. Addressing "the uncertainties inherent in setting forth a new standard of review during the course of an adjudication," the Board provided, in an appendix, "an analysis of the need for the transmission lines as it would have been conducted had the Turners Falls[. . .] precedent still been applicable." App. 2131.

The EFSB stated that it "cannot yet find that the wind farm will be available to contribute to the regional energy supply." App. 2134. The Board then concluded that

> [g]iven the complexity of the federal, state and local permitting process for this project . . . acquisition of all permits required for Cape Wind to begin installation of wind farm equipment in Nantucket Sound is necessary before the Siting

> Board could make such a finding. Accordingly, the [EFSB] finds that, to establish that the wind farm is likely to be available to contribute to the regional energy supply, Cape Wind shall submit to the [EFSB] copies of all permits required for Cape Wind to begin installation of wind farm equipment in Nantucket Sound. The [EFSB] finds that, at such time as Cape Wind complies with this condition, Cape Wind will have demonstrated that there is a need for additional transmission resources to interconnect the wind farm with the regional transmission grid. Cape Wind and NSTAR will not receive final approval of the transmission project until they comply with this condition.

App. 2134-35.

On November 8, 2004, the ACOE and the MEPA Office issued the DEIS/DEIR for the project. On November 24, 2004, the Alliance filed a Motion to Reopen Hearings to allow the DEIR/DEIS and any written comments on the DEIR/DEIS into the evidentiary record. App. 310-17; 428-54.

On November 30, 2004, the EFSB conducted a public meeting at which it considered the Tentative Decision and the Alliance's motion. App. 2074-2103. At the meeting, the Board considered the parties' comments on the Tentative Decision. Board staff had recommended that only one suggested change be adopted, namely, Cape Wind's suggestion that the Board modify the Tentative Decision to clarify that it would be "final" at the time it was rendered, as opposed to becoming

final only upon submission to the Board of "all permits required for Cape Wind to begin installation of wind farm equipment in Nantucket Sound." App. 2080; 2135. The Chairman and the Presiding Officer had the following colloquy:

> CHRM. AFONSO: . . . [I]f other permits are not issued, then . . . our decision is still final, but of no effect.
>
> MS. SEDOR: That's exactly right . . . The decision is final, which it must be. There has to be an element of finality to the proceeding. The proceeding will be over. The decision will be final. But unless each of the conditions is met, those conditions being a part of the decision, the approval cannot become effective. But the decision remains a final decision.

App. 2080. At the conclusion of the public meeting, the Board voted to have the parties submit further briefs on the Alliance's Motion to Reopen Hearings. On March 21, 2005, the Presiding Officer denied the motion. App. 700-13. On May 11, 2005, the EFSB issued its Decision adopting the Tentative Decision, as modified, and conditionally approving the transmission lines. App. 2305-2410. This appeal followed.

Summary Of The Argument

1. The EFSB violated the due process requirements of G.L. c. 30A § 11 by depriving the Alliance of "a reasonable opportunity to prepare and present evidence

and argument respecting the issues." Although the Alliance repeatedly raised the issue of what standard of need should be applied in consideration of this proposed project, the Board did not set forth any new standard throughout the factual hearing. To the contrary, the parties were led to believe that the obviously inappropriate standard set forth in Turners Falls for small, non-jurisdictional energy sources was controlling, and accordingly, the Alliance presented evidence relevant to that standard. Well after the record was closed, the EFSB announced a new standard. The EFSB's failure to announce the new standard during the proceedings deprived the Alliance of the opportunity to present evidence material to the EFSB's review of Cape Wind's § 69J Petition. Brief at 15-32.

2. The EFSB violated its statutory duty set forth in G.L. c. 164, §§ 69H and 69J to make an independent finding of need for a proposed energy facility by approving the Petition without finding that the proposed project is needed. The EFSB approved the proposed project despite finding that Applicants had not shown that the new standard was met. Also in violation of its duties, the Board deferred the determination of need to other, unidentified agencies

that have jurisdiction over the federal portions of the project. Based on its ultimate findings regarding need, the Board should have denied the Petition or stayed its proceedings until such time as Applicants could prove need. Brief at 32-41.

3. The EFSB made other errors that should be corrected on remand. These include denying the Alliance's motion to reopen the record to admit the DEIR/DEIS, which the Board's new standard made critical to its determination of whether the proposed project is needed, and failing to require Cape Wind to provide financial information required by G.L. c. 164, § 69J. Brief at 41-49.

Argument

I. THE BOARD DENIED THE ALLIANCE'S DUE PROCESS RIGHTS BY ANNOUNCING AND APPLYING A NEW STANDARD OF REVIEW FOR NEED AFTER THE RECORD IN THE CASE HAD CLOSED.

Parties to an administrative proceeding have a right to "sufficient notice of the issues involved to afford them reasonable opportunity to prepare and present evidence and argument." G.L. c. 30A, § 11(1). "If the issues cannot be fully stated in advance of the hearing, they shall be fully stated as soon as practicable," and "[i]n all cases of delayed statement, or where subsequent amendment of the issues

is necessary, sufficient time shall be allowed after full statement or amendment to afford all parties reasonable opportunity to prepare and present evidence and argument respecting the issues." Id.

The rights described in G.L. c. 30A, § 11 are among the "essential elements of due process" in Massachusetts administrative proceedings. In re Foley, 439 Mass. 324, 336 (2003). The Alliance was denied these essential due process rights because the EFSB did not fully state the issues in this case until after the record had been closed for more than six months. This denial of due process caused serious harm to the Alliance, which spent over one year litigating pursuant to a standard for need the Board eventually repudiated, while having no opportunity to litigate under the standard that replaced it.

A. The Board Failed Utterly To Provide A Clear Statement Of A Critical Issue In The Case - The Standard For Determining Whether The Proposed Project Is Needed - Until Well After Any Opportunity To Provide Evidence And Argument Regarding That Issue Had Passed.

One of the EFSB's critical functions is to determine whether a proposed new transmission line is "needed," as that term is used in G.L. c. 164, §§ 69H and 69J. A clear statement of the standard the Board

will be applying to its determination of need is, thus, critical to a party's ability to participate meaningfully in the agency process. Rather than provide such a statement in a timely manner, the EFSB repeatedly and egregiously violated its duty under G.L. c. 30A, § 11(1).

The violation in this case could not be more blatant: The Board announced and applied a new, radically different standard for judging the need for proposed transmission lines for the first time in its Tentative Decision, seven months after the last day of hearings, and more than six months after the record had closed. The Alliance had no opportunity to present evidence or argument regarding the new standard or its application to the facts of the case. This was a denial of its fundamental due process rights, as guaranteed by G.L. c. 30A, § 11(1).

1. The Board Had Ample Notice That The Standard For Determining The Need For The Proposed Project Would Be A Major Issue In The Case, And Failed To Act.

It is difficult to fathom the EFSB's failure to make a full statement of the most fundamental issue in this case until the case was essentially over. It was clear early in the proceedings that the standard of

need the Board would be applying was a major issue in the case, due to the unique nature of the project involved, and the parties' disagreement about how EFSB precedent should be applied to the cables in question. App. 278.

From the moment the Petition was filed, this project's jurisdictional uniqueness was apparent. App. 11-12. The Board would be reviewing proposed transmission lines that would interconnect a generating plant physically outside the Commonwealth, in federal waters, but located in the middle of Nantucket Sound, a body of water of such importance that Massachusetts had fought with the United States over its control for more than a decade. No project previously reviewed by the Board is even remotely analogous. Moreover, the plant would be subject to a complex and uncertain federal permitting process that was already in litigation by the time hearings in this case began. If there was ever a case that called for early and careful articulation of the manner in which the Board would undertake its statutory duties, this was it.

In addition, soon after the case began, it was clear that the parties differed in their interpreta-

tions of the standard of review for need and the scope of the proceeding that would be dictated by it. In the Petition, Applicants cited the Turners Falls standard without reservation, but soon began to back away from that standard when the Alliance argued that its application would require the Board to undertake a more extensive examination of the wind project than Applicants may have anticipated. App. 39-41; 278. Before filing its direct case, the Alliance urged the Board to deal directly with this issue, in terms that now appear prophetic:

> Any changes in the [EFSB's] standard of review should be articulated . . . only **after** the [Board] has the benefit of full briefing by the parties and **before** the completion of the Petitioner's direct case, the completion of responses to interrogatories, the submission of direct cases by other parties, and the holding of evidentiary hearings. Any doubt about the standards of review being applied as the parties go forward will only lead to costly and confusing evidentiary and procedural chaos.

App. 253-54 (emphasis in original).

Rather than take control of the issue, the Board made matters worse by encouraging increased reliance on the standard it would, in the end, repudiate completely. In her June 2003 ruling on the Alliance's Motion to Suspend, the Presiding Officer stated that the project "will be reviewed in the context of

existing [EFSB] precedent," which was "embodied in documents available to the intervenors, and to the public generally, for review." App. 275. In reliance on that ruling, the Alliance filed the testimony of five witnesses regarding the need for the project based on the Turners Falls standard. App. 5576-5756. In July 2003, the Presiding Officer denied Cape Wind's Motion to Strike much of the Alliance's testimony, finding that certain characteristics of the non-jurisdictional portions of the wind project would be relevant to the EFSB's inquiry under the Turners Falls standard, and could also support the Alliance's more rigorous view of the "environmental need" prong of that standard. App. 303-304.8. However, neither ruling, nor any other statement by the Board before evidentiary hearings were closed, gave any indication that the Board would reject the Turners Falls standard completely, in favor of an entirely new interpretation of how one proves the "need" for a new transmission line under G.L. c. 164, §§ 69H and 69J. App. 303-304.8.

The first sign that the EFSB was reconsidering the Turners Falls standard came only after the evidentiary hearings had closed and the parties were

preparing briefs. On October 28, 2003, the Presiding Officer issued "briefing questions" seeking the parties' views on the continued viability of the Turners Falls standard. App. 6142. This action fell well short of a timely statement of the issues, as required by G.L. c. 30A, § 11(1). To comply with the statute, it is not enough for the agency to hear from the parties; the parties must hear from the agency. In this case, the clear statement of the standard for determining need that the Alliance had sought for over a year did not come until the Board released its Tentative Decision, more than six months after any opportunity to provide evidence or argument based on that standard had passed. App. 2127-31. Considering the radical change the EFSB eventually made in the standard, the mere issuance of briefing questions after hearings had closed was too little, too late.

2. The EFSB's Violation Of G.L. c. 30A, § 11(1) Caused Serious Harm To The Alliance.

The Board's violation of G.L. c. 30A, § 11(1) severely limited the Alliance's ability to participate meaningfully in this case. The new standard for determining need under G.L. c. 164, § 69J that the Board announced for the first time in its Tentative

Decision was radically different from the standard on which the Alliance had extensively relied. Under the Turners Falls standard, the EFSB considered the potential impacts, with respect to reliability, economic efficiency, and the environment, of the power that would be carried by a proposed transmission line. App. 40. As the Board recognized, applying this standard requires it to consider characteristics of the generating plant the transmission line would interconnect. App. 38-41. This type of evidence constituted most of the Alliance's case. App. 2321-24; 5576-5756. Through the testimony of its five witnesses, the Alliance sought to show that the economic, reliability, and environmental benefits claimed by Applicants were either non-existent, or so miniscule as to be outweighed by the potential environmental harm that would be caused by the wind project and the cables. App. 2321; 5576-5756.

In contrast, under the new standard, an applicant must demonstrate the need for a proposed transmission line to interconnect a new generating plant by showing that (1) the existing transmission system is inadequate to interconnect the new plant, and (2) the new plant is likely to be available to contribute to

the regional energy supply. App. 2131; 2321. The adoption of this standard, with its focus on the process involved in getting the plant permitted, financed, and built, rather than on any physical characteristic of the plant or its operation, severely undercut the Alliance's testimony and argument. App. 2131. Indeed, in applying its new standard to the proposed project, the Board did not cite or otherwise refer to any evidence or argument presented by the Alliance. App. 2134-35; 2336-37.

In addition to rendering more than one year of litigation by the Alliance almost meaningless, the Board's adoption and application of its new standard only after the record had closed prevented the Alliance from offering evidence that would have been relevant to the new standard. Evidence regarding the two factual issues the EFSB cited in its description of the new standard ("progress in permitting or in obtaining project financing") was and is plentiful. App. 2131; 2335-37. The Alliance could have presented evidence from experts on project financing, who would have testified that, with its high level of reliance on government subsidies and tax breaks for profitability, the wind project would have a very

difficult time obtaining financing. The Alliance could also have presented evidence from experts on the federal permitting process, who would have testified that Cape Wind's ability to negotiate the Federal review of that process successfully was by no means certain, and any conclusion by the EFSB that the wind project was "likely to be available" could not be supported by credible evidence. App. 2131, 2336. (As discussed further in Section III.A.2., that permitting process has only gotten more complex and Cape Wind's prospects more uncertain since the Board prematurely closed the record in December 2003.)

In short, the Board's violation of G.L. c. 30A, § 11(1) was not harmless error. It struck at the very heart of the Alliance's ability to participate meaningfully in the EFSB's administrative process, rendering the extensive evidence presented by the Alliance moot, and preventing the introduction of evidence relevant to the actual issues being decided by the Board. The only cure for such a denial of due process is to vacate the EFSB's Final Decision, and remand this case for further proceedings.

B. The Board Did Not Cure Its Denial Of Due Process By Applying Its Former Standard Of Review In An Appendix.

In an apparent attempt to save itself from the repercussions of having denied the Alliance's fundamental due process rights by announcing and applying a new standard of review at the end of the case, the EFSB purportedly conducted an alternative analysis of the need for the transmission lines using the Turners Falls standard. App. 2085; 2250-2304. This attempt fails utterly. The Board had already repudiated the Turners Falls standard as being outdated, having been rendered obsolete by statutory changes since those cases were decided. App. 2318.1; 2319. The Board noted in particular the amendment to G.L. c. 164, § 69H, which "explicitly prohibits the Siting Board from seeking data regarding the need for or cost of a proposed generating facility, except for certain narrowly-defined cost data." App. 2318.1. The Board went on to find:

> Since the [EFSB] no longer reviews the need for power to be generated by power plants, applying a Turners Falls-style analysis in this case would not be consistent with Siting Board practice and statutory mandate. Rather, it would be inconsistent with current practice - the limited review of jurisdictional generating facilities now undertaken pursuant to G.L. c. 164, § 69J¼ - and with

> the Commonwealth policy, articulated in G.L. c. 164, § 69H, of allowing market forces to determine the need for new generation.

App. 2331-32.

The EFSB's finding that a "Turners Falls-style" standard of review is inappropriate for jurisdictional transmission lines interconnecting any kind of power plant - whether jurisdictional to the Board or not - was well within the Board's discretion, and the Alliance does not challenge the EFSB's conclusion that a new standard of review is appropriate. Sch. Comm. of Springfield v. Bd. of Educ., 362 Mass. 417, 441 (1972). Having exercised its discretion in devising a new standard of review, however, the EFSB was not free to deny the Alliance's right to offer evidence and argument based on that standard, nor was it free to apply the repudiated standard merely to protect itself on appeal.

Rather than cure the Board's denial of the Alliance's due process rights, the application of the Turners Falls standard in the Appendix to the Final Decision merely answered a purely academic question: what would the result in this case have been if the Petition had been filed before the amendments to G.L. c. 164, §§ 69H and 69J¼ had rendered the Turners Falls

standard obsolete? The time and effort expended in conducting an alternative analysis under a standard of review the Board had discarded should instead have gone into devising a means to comply with G.L. c. 30A, § 11(1) with respect to the new standard the Board actually relied upon.

Further, the stratagem of applying the new and the old standards for determining need only appeared reasonable to the Board because it believed Applicants had met their burden of proof under both standards. Yet, as discussed further below, this belief is an illusion. The EFSB made an ultimate finding that Applicants had not met their burden of proof under the new, "likely to be available" standard. App. 2336. This finding should have led the Board to deny rather than to approve the Petition. The application of the Turners Falls standard in the Appendix, thus, does not complement the application of the new standard; it highlights the Board's inability to recognize how far it had strayed from carrying out its statutory duties in a fair and even-handed manner.

The fact that the Board nonetheless approved this project is remarkable. But the Presiding Officer's statements in response to the Chairman asking whether

it was "not a violation of due process to not announce in advance . . . a standard of review before commencing an adjudicatory proceeding" are a strong indication that the EFSB lost sight of its statutory obligations early in this case: "I think I represent the unanimous feeling of staff that what we did was legally permissible, protected to the greatest extent that we could come up with the parties' due-process rights, and I think it got us a good result." App. 2082-83. To cure these errors, the Court should vacate the Board's Final Decision, and remand this case for further proceedings.

3. The Board's Reasons For Not Announcing The New Standard Earlier Are Unacceptable.

During the Board's November 30, 2004 public meeting, EFSB staff offered various explanations for their inaction. App. 2082-86. All of these excuses ring hollow. For example, at the public meeting, the EFSB's General Counsel stated: "The complexities of this particular case just made it very difficult at the beginning to articulate a clear standard of review." App. 2084. The Presiding Officer conceded: "I guess it's fair to say that, yes, one can make [the] argument[] that it might have been better if we had

been able to think about in advance, before understanding all of the evidence in the case, what might have been a usable, sensible, workable new standard of review. That wouldn't have been a bad way to go if we could have done that. We weren't able to do that." App. 2083. These statements do not excuse or justify the Board's failure to comply with G.L. c. 30A, § 11(1) but, rather, are a frank admission that the EFSB did not provide a clear statement of the issues to the parties, as required by the statute.

Even the weak explanations offered at the public meeting do not withstand scrutiny. When pressed by the Chairman, neither the Board's General Counsel nor its Presiding Officer could identify any specific "complexity" or other characteristic of the case that prevented EFSB staff from addressing the standard of review earlier in the case. App. 2083-85. As discussed above, the proposed project does present an unprecedented jurisdictional scenario, but this fact was obvious from the start. App. 11-12. The unique and important nature of the project is hardly an excuse for failing to provide adequate guidance to the parties, as required by G.L. c. 30A, § 11(1); it is a reason for scrupulous compliance with the statute,

lest the parties and the agency itself be denied the full benefits of the adjudicatory process.

In addition, the EFSB's reasons for abandoning the Turners Falls standard were also apparent from the beginning of the case. The Board claimed that its primary concern regarding the continued viability of a "Turners Falls-type" standard of review was that it no longer had authority to review the need for generating plants as a result of changes in the EFSB's enabling statutes. App. 2082; 2329-33. It is true that the Board's enabling statute had been amended since the Turners Falls and MECo/NEPCo cases were decided, but these changes took place in November 1997, nearly five years before the Petition in this case was filed. St. 1997, c. 164, § 204. Moreover, the EFSB had recently reviewed a transmission line and related generating plant under the revised statutory provisions. Mirant Kendall, EFSB 99-4 (December 15, 2000); Cambridge Electric Light Company, EFSB 00-3/DTE 00-103 (September 25, 2001). The Board cannot credibly cite those same statutory revisions as justifying its 21 months of paralysis - from the filing of the Petition in September 2002 to the release of the Tentative Decision in July 2004 - with respect to the standard

of review in this case. App. 2329-33.

Finally, even if the EFSB reasonably believed that the give-and-take of an actual proceeding would help it shape a new standard for determining need, this would not leave the Board free to deny the Alliance's due process rights by failing to give the parties a reasonable opportunity to present evidence and argument based on the new standard. General Laws c. 30A, § 11(1) is clear on this point: "In all cases of delayed statement, or where subsequent amendment of the issues is necessary, sufficient time shall be allowed after full statement or amendment to afford all parties reasonable opportunity to prepare and present evidence and argument respecting the issues." The statute contains no exceptions for complex or novel cases. When the EFSB's consideration of the record and the parties' responses to the briefing questions ripened into the "likely to be available" standard that was announced in the Tentative Decision, the Board was obliged to inform the parties of the new standard, and allow the Alliance and others a "reasonable opportunity to prepare and present evidence and argument respecting the issues" presented by the new standard. The Board's failure to adhere to

this fundamental principle of due process is a clear violation of G.L. c. 30A, § 11(1), which requires that the Final Decision be vacated, and this matter be remanded for further proceedings.

II. IN APPLYING THE "LIKELY TO BE AVAILABLE" STANDARD, THE BOARD MADE CONCLUSIONS OF LAW TOTALLY AT ODDS WITH ITS ULTIMATE FINDINGS, AND VIOLATED ITS LEGISLATIVE MANDATE BY FAILING TO MAKE AN INDEPENDENT FINDING OF NEED FOR THE PROPOSED FACILITY AND BY IMPROPERLY DELEGATING THAT FUNCTION TO OTHER AGENCIES.

One of many unusual aspects of this case is the fact that, from the time the EFSB released its Tentative Decision on July 2, 2004 to the time the first public meeting to consider the Tentative Decision was held on November 30, 2004, the Alliance believed the Petition had been effectively denied. While the Alliance was disappointed in the untimely announcement of the new "likely to be available" standard for determining need, application of that standard pointed toward the denial of the Petition:

> As the wind farm is not yet under construction, and is not subject to the [EFSB]'s jurisdiction, we consider its availability based on its progress in permitting . . . [E]nvironmental permitting for the wind farm is in its early stages, and the [EFSB] cannot yet find that the wind farm will be available to contribute to the regional energy supply.

App. 2134.

The Board found further that "acquisition of all permits required for Cape Wind to begin installation of wind farm equipment in Nantucket Sound is necessary before the [EFSB] could make such a finding," and that Applicants "will not receive final approval of the transmission project until they comply with this condition." App. 2134-35. Because no state agency may issue a construction permit for a new transmission line "unless the petition to construct such facility has been approved by the [EFSB]" (G.L. c. 164, § 69J), how could final approval by the EFSB and the completion of state construction permitting for the transmission lines move forward before the federal process was complete?

On the morning of the November 30, 2004 public meeting to consider the Tentative Decision, however, EFSB staff announced that it was recommending adoption of a change, suggested by Applicants, that would result in immediate final approval of the Petition, despite the Board's explicit finding that it could not yet conclude that the proposed transmission lines were needed due to the project's lack of progress in permitting. App. 2080. When the EFSB voted on May 10, 2005 to issue a Final Decision that included this

change, it erred on several counts.

A. The EFSB's Approval Of The Petition Cannot Be Reconciled With Its Finding That Applicants Did Not Prove The Project Is Needed.

The EFSB cannot approve a petition to construct a new energy facility unless and until the Board concludes that the facility is needed. G.L. c. 164, § 69H; Point of Pines Beach Ass'n v. Energy Facilities Siting Bd., 419 Mass. 281, 286 (1995). The applicant bears the burden of showing that additional energy resources are needed. City of New Bedford v. Energy Facilities Siting Board, 413 Mass. 482, 486 (1992).

The Board's ultimate finding in applying the "likely to be available" standard to the record in this case could not be more clear that Applicants had, in fact, failed to meet their burden of showing that the proposed transmission lines are needed. App. 2336. The Board concluded that, based on the lack of progress in permitting the project, it "cannot yet find that the wind farm will be available to contribute to the regional energy supply." App. 2134; 2336. That finding was carried over intact from the Tentative Decision to the Final Decision. App. 2134; 2336. The only thing that changed was the legal conclusion the EFSB reached based on its ultimate

finding. Rather than deny the Petition, or preserve the legal conclusion reached in the Tentative Decision, in which final approval would be withheld until such time as Applicants could meet the "likely to be available" standard, the Board simply approved the Petition.

The Board's legal conclusion approving the project was arbitrary and capricious, and must be vacated. The EFSB's conclusion regarding need in the Final Decision is a tautology: "The proposed project will have shown that it is needed once it shows that it is needed." This approach to determining the need for a transmission facility is a clear violation of G.L. c. 164, § 69H. The finding of need is not a mere subsidiary finding that can be made on a conditional basis; it is an "ultimate finding" that the EFSB must make in order to approve a project. Point of Pines Beach Ass'n, 419 Mass. at 285. Having failed to make such a finding regarding the proposed transmission lines, the Board was obliged either to deny the Petition, or to defer its final decision until Applicants could show that the facility was "likely to be available to contribute to the regional energy supply."

The issuance of a final decision without having found that the transmission lines are needed is especially troublesome given the role the EFSB's approval plays in other state permitting processes. Being charged with conducting the most comprehensive review of jurisdictional energy facilities, (see G.L. c. 164, §§ 69H et seq.), the EFSB serves a gate-keeper function. General Laws c. 164, § 69J states that "no state agency shall issue a construction permit for any such facility unless the petition to construct such facility has been approved by the board." Other state agencies subsequently reviewing a project also rely on the EFSB's finding that the project and the energy provided by the project are needed. In this case, the Board made no such finding, and other state permitting agencies cannot move forward based on the purely conditional premise that the project is needed.[1]

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[1] Even before the Board's decision was final, Cape Wind exploited the "conditional" finding of need, representing in the DEIR/DEIS that the EFSB had found the project was needed, without informing the ACOE and the MEPA agency that (a) the Board's decision was not yet final, and (b) the finding of "need" was conditioned on the issuance of the ACOE's §10 Permit. DEIR/DEIS § 7.3.2.1. In addition to being misleading, this argument also reduced to a tautology: "The ACOE should issue the §10 Permit because the EFSB has found that the project will be needed once the ACOE issues the §10 Permit."

The view put forth by the EFSB Chairman and Presiding Officer at the November 30, 2004 public meeting is sophistry, namely, that the Board's decision can be "final" without an ultimate finding of need, and can be "final but of no effect" should the Board's conditions for a showing of need fail to materialize. App. 2080. An EFSB decision purporting to be "final" has the immediate and irrevocable effect of signaling to other state agencies that they may work toward the issuance of other necessary permits for a facility. In this case, the EFSB had its fingers crossed when it "approved" this project, and the Presiding Officer's repeated reassurances that the "decision is final, which it must be," are wishful thinking. App. 2080. The Board's order, which characterizes itself as final before the requisite findings are actually made, negates the EFSB's threshold role, and causes other state permitting agencies to proceed under false pretenses. If only on these grounds alone, the Board's Final Decision should be vacated, and remanded with instructions either to deny the Petition for lack of a showing of need, or to hold further proceedings aimed at allowing the EFSB to render an actual determination of whether the proposed

transmission lines are needed.

B. The Board Impermissibly Delegated Its Statutory Duties To Other Agencies.

In addition to being a required "ultimate finding," the determination of need for a new transmission facility is a duty the EFSB cannot abdicate. Point of Pines Beach Ass'n, 419 Mass. at 285. "The board must ensure that every project is necessary, and it may not abdicate its responsibility by relying on conclusions of [another] department." Id. at 286.

In its Final Decision, the Board found that "to establish that the wind farm is likely to be available to contribute to the regional energy supply, Cape Wind shall submit to the [EFSB] copies of all permits required for Cape Wind to begin installation of wind farm equipments in Nantucket Sound." App. 2336-37; 2405.042-.044. This approach to finding need impermissibly delegated an essential statutory duty to other agencies. The Board failed even to identify the required permits or the agencies that would be issuing them. App. 2336-37; 2405.042-.044.

In Point of Pines Beach Ass'n, 419 Mass. 281, this Court struck down a less cavalier approach to

determining the need for a jurisdictional energy facility. In that case, because it was "unable to determine that the proposed project is needed to provide a necessary energy supply for the Commonwealth," the EFSB conditionally granted approval of a proposed generating facility. Id. at 284. Specifically, the Board required that the applicant submit a power purchase agreement approved by the DTE within four years of the date of the conditional approval, in order to demonstrate that the proposed project would provide a necessary energy supply. Id. at 282-283. This Court vacated the EFSB's decision, holding that the Board improperly delegated its responsibilities under its enabling statute: "The board must ensure that every project it approves is necessary, and it may not abdicate its responsibility by relying on conclusions of the department." Id. at 285.

In Point of Pines Beach Ass'n, at least the Board delegated its responsibility to a sister state agency, of which the EFSB is technically a division. G.L. c. 164, § 69H. In this case, the Board abdicated its statutory duty to unspecified other agencies acting pursuant to an unidentified collection of statutory

authorities. App. 2336-37; 2405.042-.044. The Board made no findings regarding the manner in which approvals by these other agencies under these other authorities relate in any way to the EFSB's core responsibility to determine whether an energy facility is needed for purposes of G.L. c. 164, §§ 69H and 69J. App. 2336-37; 2405.042-.044.

The net result of the EFSB's approach in this case is that the Board's role in determining the need for the proposed transmission facility is rendered purely ministerial. Applicants simply file copies of their other permits once they are obtained, and the transmission lines become "needed" for purposes of §§ 69H and 69J. The legislature intended the EFSB to be more than a mail drop in determining whether projects with potential impacts as significant as transmission facilities are needed.

In order to cure the Board's failure to exercise its essential statutory duties, the Final Decision should be vacated and remanded, with instructions to either deny the Petition, based on the Board's finding that Applicants did not prove the project is likely to be available to contribute to the regional energy

supply, or to conduct further proceedings resulting in an actual determination of need for this project.

III. THE BOARD MADE OTHER ERRORS THAT SHOULD BE CORRECTED ON REMAND.

In addition to its errors in determining the need for the proposed project, the EFSB made other errors that should be corrected on remand.

A. The Board Erred In Denying The Alliance's Motion To Reopen The Hearings To Admit And Consider The DEIR/DEIS And Related Comments.

Shortly after the ACOE released the DEIR/DEIS for the proposed project on November 8, 2004, the Alliance moved to reopen the record to admit those documents and any associated public comments. The Board denied the motion, finding that, while the Alliance had shown that the proffered evidence was both relevant and unavailable at the time of the hearings, the Alliance had not shown good cause pursuant to 980 C.M.R. § 1.09(1). The Board found that "[t]o demonstrate good cause clearly, a party must show that the new evidence, if allowed into the record, would be likely to have a significant impact on the [EFSB]'s decision in the proceeding." App. 709. This ruling was an abuse of the agency's discretion, and should be reversed on remand.

1. The DEIR/DEIS And Associated Comments Would, By Definition, Have A Significant Impact On The Board's Decision In This Case.

In applying its new "likely to be available to contribute to the regional energy supply" standard for determining need, the EFSB made successful completion of the federal permitting process (including, presumably, the § 10 Permit being administered at the time by the ACOE) a critical condition for establishing that the proposed project is needed. App. 2336-37; 2405.042-.044. Considering the importance of the § 10 Permit, and the key role the DEIR/DEIS and associated comments would play in determining whether Cape Wind would be successful in obtaining the § 10 Permit, the Board's finding that admitting the DEIR/DEIS and associated comments would not have a significant effect on its decision is simply not rational.

At the very least, admitting the DEIR/DEIS into evidence would change the Board's finding that "the ACOE . . . has not yet issued a Draft Environmental Impact Statement." App. 2336. This finding was carried over from the Tentative Decision to the Final Decision, which was released on May 11, 2005, six months after the DEIR/DEIS had, in fact, been issued

by the ACOE, and nearly as long after the Alliance had moved to reopen the record to admit it. App. 2134; 2336. More importantly, the Board cited the absence of the DEIR/DEIS as a major factor in finding that Applicants could not yet show a need for the proposed project under the new standard. App. 2336. If the DEIR/DEIS's absence caused the Board to find that Applicants could not yet show a need for the proposed project, the release of the DEIR/DEIS, and the reactions to it by the federal agencies providing input on its substantive provisions, would, by definition, have a significant impact on the Board's findings with respect to determining whether the proposed project is needed. Indeed, such evidence would be more probative on the issue than anything already in the EFSB record.

That the Board found otherwise is yet another indication that it had totally abdicated its statutory duty to make an independent determination of need for this project pursuant to G.L. c. 164, §§ 69H and 69J. The Board not only attempted to delegate this duty to federal agencies such as the ACOE; it did not even care to know what progress those agencies might be making in the regulatory processes that will determine

whether the proposed project is ever "available to contribute to the regional energy supply." App. 2336-37; 2405.042-.044. Admitting the DEIR/DEIS and associated comments would have allowed the EFSB to make its own determination of whether Cape Wind would ever show sufficient progress in permitting the wind project to warrant approval, an inquiry the Board apparently had no interest in making.

2. The Proffered Evidence Would Have Seriously Undermined The EFSB's Approval Of The Proposed Project.

Had the Board admitted the DEIR/DEIS and associated comments, and actually tracked the federal permitting process it was now relying upon to determine the need for the proposed project, the EFSB would have had to confront evidence that was strongly at odds with its desire to approve this project under whatever standard might allow that result. The United States Department of the Interior ("USDOI") and its subsidiary were highly critical of the overall adequacy and quality of the DEIS. For example, the United States Geological Survey ("USGS") stated:

> In many cases "conclusory statements" regarding environmental impacts of the proposed Cape Wind Energy Project (CWEP) cannot be supported by the data collected and analyses done. While some sections appear to have been done reasonably

> well, others are not and in certain regards the DEIS is at best incomplete, and too often inaccurate and/or misleading.

USDOI comments on DEIR/DEIS at 3-4 . Comments by other USDOI agencies were similarly critical.

The United States Environmental Protection Agency's ("USEPA") assessment of the DEIR/DEIS was even more caustic. USEPA found the DEIR/DEIS to be "inadequate," and that "many of the concerns raised by EPA and other cooperating agencies about the project, the consideration of alternatives, and the analysis of impacts have not been addressed in the DEIS." USEPA comments on DEIR/DEIS at 2. The USEPA concluded:

> We do not believe that the DEIS provides enough information to fully characterize baseline environmental conditions, the substantial environmental impacts of the proposed project, and alternatives that avoid or minimize those impacts. Without this information we do not believe an adequate mitigation and monitoring plan can be developed, nor can a decision be made as to whether the project is environmentally acceptable and in the public interest.

Id.

The course of federal permitting for the wind project has become even more uncertain since the EFSB issued its Final Decision. The Energy Policy Act of 2005 delegates to the Secretary of the Interior the power to authorize offshore alternative energy

development, including wind projects. P.L. 109-58, § 388. At this time, the Minerals Management Service (MMS) - the agency responsible for implementing the new offshore energy program - has not promulgated regulations for its offshore program. In fact, on May 5, 2006, the MMS announced its intent to conduct a programmatic environmental impact statement to evaluate the potential environmental effects of implementing the program, indicating that the program itself will not be developed for some time. See 71 Fed. Reg. 26559 (May 5, 2006).

Cape Wind will not be able to obtain the necessary permitting from MMS before MMS has completed its programmatic review and promulgated regulations. In addition, MMS has decided to conduct its own environmental impact statement for the Cape Wind project. Because of deficiencies in the initial review, such as those discussed above, and because a new regulatory framework is in place, MMS has determined that independent review is necessary. MMS has not even reached a point in its review where it has taken the required initial step of announcing its intent to proceed with the Cape Wind EIS process.

In effect, the review of the Cape Wind project is

now no more advanced that it was in late 2001, when it had filed it application with the ACOE, but no steps had yet been taken to announce the preparation of an EIS. The EIS process and the panoply of associated federal, state and local procedures will take years to complete. The ACOE review itself took over three years simply to reach the DEIS stage. Needless to say, the information that will be considered by MMS, under the new standards of the Energy Policy Act and the as yet to be proposed MMS regulations, will be vastly different than what was before the ACOE.[2]

If the EFSB is to retain the "likely to be available" standard for determining the need for this project, it cannot hide from this evidence, which strongly suggests that the Cape Wind project is highly unlikely to be available to contribute to the regional energy supply. Clearly, it is premature for the EFSB to reach a determination based upon the completion of highly uncertain and extended permitting procedures

[2] In addition to the MMS and ACOE permit requirements, the project will also have to undergo review for compliance with the Endangered Species Act, the Clean Water Act, the Clean Air Act, the Migratory Bird Treaty Act, the Marine Mammals Protection Act, the National Historic Preservation Act, the Fishery Conservation and Management Act, the Oil Spill Prevention Act, and the Coastal Zone Management Act.

that have not even reached a point under the revised MMS federal scheme that is comparable to where the ACOE process stood at the time the EFSB issued its decision on May 11, 2005. On remand, the Board should be directed to admit the DEIR/DEIS, associated public comments, and other evidence of Cape Wind's progress in federal permitting, such that the EFSB can make an independent assessment of the need for the proposed transmission lines.

B. The Petition Failed To Include The Financial Information Required By § 69J.

Section 69J of Chapter 164 of the General Laws sets out the financial information that must be included in petitions before the Siting Board. A careful reading of this section makes it clear that some of the requirements apply to both oil and non-oil facilities, and some apply only to oil facilities. In the case of a non-oil facility, such as transmission facilities, the statutorily mandated information includes information about capital investment plans to complete the facility, the long-term economic viability of the facility, and the overall financial soundness of the applicant.

Applicants provided no such information about

this project or Cape Wind, which would be paying to build, operate and maintain the cable. Cape Wind resisted furnishing such information when requested in interrogatories, and took the position at the November 30, 2004 public hearing that the financial information requirement applies only to oil facilities. App. 2095. This position is belied by the plain language of the statute, and the consequences for failing to provide such information include rejection of the Petition. On remand, the EFSB should require that Applicants provide the required information, or the Petition should be denied. The complete lack of any evidence about capital investment plans, project long term economic viability, and the Cape Wind's financial soundness in a case with such enormous consequences is astonishing by any measure. Given the statutory mandate that this information be provided, it is inexcusable.

Conclusion

Based on the foregoing, the Alliance respectfully requests that this Court vacate the EFSB's Final Decision approving the Petition, and remand this case with instructions to deny the Petition for want of a showing that the proposed transmission lines are needed or, in the alternative, for further proceedings consistent with the Court's order.

Respectfully submitted
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CERTIFICATE OF COMPLIANCE PURSUANT TO R.A.P. 16(k)

I, Lee M. Holland, counsel for Plaintiff-Appellant Alliance to Protect Nantucket Sound, Inc., hereby certify that the ***Brief for the Plaintiff-Appellant Alliance to Protect Nantucket Sound, Inc.*** complies with the Rules of Court that pertain to the filing of briefs, including, but not limited to, the Rules noted in R.A.P. 16(k) and the February 8, 2006 Reservation and Report.

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CERTIFICATE OF SERVICE

I, Lee M. Holland, counsel for Plaintiff-Appellant Alliance to Protect Nantucket Sound, Inc., hereby certify that copies of the ***Brief for the Plaintiff-Appellant Alliance to Protect Nantucket Sound, Inc.*** and the ***Joint Appendix*** thereto were served on the following parties on May 10, 2006, as follows:

Ten (10) copies to:

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ADDENDUM

G.L. c. 164, § 69H

G.L. c. 164, § 69J

G.L. c. 164, § 69P

G.L. c. 164, § 72

G.L. c. 25, § 5

G.L. c. 30A, § 11

G.L. c. 30, § 61

42 U.S.C. § 4321

33 U.S.C. § 403

St. 1997, c. 164, § 204

980 C.M.R. § 1.09

Federal Energy Policy Act of 2005, § 388

PART I ADMINISTRATION OF THE GOVERNMENT
TITLE XXII CORPORATIONS
Chapter 164 Manufacture and Sale of Gas and Electricity
[ELECTRIC POWER FACILITIES SITING]

GO TO MASSACHUSETTS CODE ARCHIVE DIRECTORY

ALM GL ch. 164, § 69H (2005)

§ 69H. Energy Facilities Siting Board; Membership, Powers, Duties.

There is hereby established an energy facilities siting board within the department, but not under the supervision or control of the department. Said board shall implement the provisions contained in sections 69H to 69Q, inclusive, so as to provide a reliable energy supply for the commonwealth with a minimum impact on the environment at the lowest possible cost. To accomplish this, the board shall review the need for, cost of, and environmental impacts of transmission lines, natural gas pipelines, facilities for the manufacture and storage of gas, and oil facilities; provided, however, that the board shall review only the environmental impacts of generating facilities, consistent with the commonwealth's policy of allowing market forces to determine the need for and cost of such facilities. Such reviews shall be conducted consistent with section 69J1/4 for generating facilities and with section 69J for all other facilities.

The board shall be composed of the chairman and two additional commissioners of the department, the secretary of environmental affairs or his designee, the director of economic development or his designee, the commissioner of energy resources or his designee, and three public members to be appointed by the governor for terms of three years, two of whom shall be experienced in environmental and consumer matters and one of whom shall be experienced in matters relating to the development of energy facilities. The two additional commissioners of the department shall be the commissioner with experience in electricity and energy issues and the commissioner with expertise in consumer protection and advocacy issues as set forth in section 2 of chapter 25. If one of such commissioners serves as the chairman or if one or more of these three positions is vacant, additional commissioners shall be appointed to the board in the following order to ensure that three commissioners of the department serve on the board at all times: (1) the commissioner whose expertise is not specified in said section 2 of said chapter 25; (2) the commissioner with expertise in telecommunications issues; and (3) the commissioner with expertise in cable television issues. The board shall not include as a public member any person who receives, or who has received during the past two years a significant portion of his or her income directly or indirectly from the developer of an energy facility or an electric, gas or oil company. The public members shall serve on a part-time basis, receive $100 per diem of board service, and shall be reimbursed by the commonwealth for all reasonable expenses actually and necessarily incurred in the performance of official board duties. Upon the resignation of any public member, a successor shall be appointed in a like manner for the unexpired portion of the term. No person shall be appointed to serve more than two consecutive full terms.

The chairman of the department shall serve as the chairman of the board. In the event of the absence, refusal or disqualification of the chairman, the director of consumer affairs and business regulation shall appoint an acting chairman from the remaining members of the board. The board shall meet at such time and place as the chairman may designate or upon the request of three members. Four members shall constitute a quorum.

In carrying out its functions, the board shall cooperate with, and may obtain information and recommendations from every agency of the state government and of local government which may be concerned with any matter under the

purview of the board. Each state or local government agency is directed to provide such information and recommendations as may be requested by the board. The board shall cooperate with other states and with the federal government or any agency thereof, as authorized under section sixty-nine Q and as otherwise authorized by law. The board may receive and expend such funds as are appropriated or as may be available to it from the funds of any other agency.

The board shall have powers and duties as follows:

(1) To adopt and publish rules and regulations consistent with the purposes of sections sixty-nine H to section sixty-nine Q, and to amend the same from time to time. This includes rules and regulations for the conduct of the board's public hearings under the provisions of sections sixty-nine H1/2, sixty-nine I, sixty-nine J and sixty-nine M.

(2) To accept petitions for certificates of environmental impact and public need on such forms as it may prescribe, consistent with the provisions of section sixty-nine L; to conduct preliminary investigations thereon and solicit information and recommendations relating thereto; to conduct public hearings in accordance with the provisions of sections sixty-nine M and sixty-nine N and to supervise the enforcement of the terms and conditions of certificates so issued; to approve or reject petitions to construct facilities and notices of intention to construct an oil facility in accordance with the provisions of section sixty-nine J; and to accept for review and approval or rejection any application, petition, or matter related to the need for, construction of, or siting of facilities referred by the chairman of the department pursuant to section four of chapter twenty-five; provided, however, that in reviewing such application, petition, or matter, the board shall apply department and board standards in a consistent manner.

(3) Where the applicant has petitioned the board with respect to a national pollutant discharge elimination system permit, the board shall be required to make a tentative determination as to the resolution of that petition, which determination shall be included in the public notice as required by section sixty-nine M.

(4) The board shall have the opportunity to issue orders with respect to any matter over which it has jurisdiction. Any applicant who violates any such order shall be subject to a civil penalty not to exceed $1000 for each violation for each day that the violation persists; provided, however, that the maximum civil penalty shall not exceed $200,000 for any related series of violations.

HISTORY: 1973, 1232, § 1; 1974, 852, § § 3-5; 1975, 617, § § 2, 3; 1976, 468, § 1; 1977, 167; 1979, 796, § § 16-18; 1980, 572, § 351; 1983, 233, § 69; 1989, 730, § § 36-38; 1990, 150, § § 325, 326; 1990, 177, 348; 1991, 138, § 201; 1991, 193, § § 7, 9; 1992, 133, § 170; 1992, 141, § 9; 1997, 164, § § 205, 205; 1998, 161, § § 545, 546; 1999, 127, § 152.

PART I ADMINISTRATION OF THE GOVERNMENT
TITLE XXII CORPORATIONS
Chapter 164 Manufacture and Sale of Gas and Electricity
[ELECTRIC POWER FACILITIES SITING]

GO TO MASSACHUSETTS CODE ARCHIVE DIRECTORY

ALM GL ch. 164, § 69J (2005)

§ 69J. Petition for Approval of Construction of Gas or Electric Facility; Notice of Intention to Construct Oil Facility; Contents of Petition or Notice; Public Hearings; Approval, Conditioned Approval, or Rejection of Petition or Notice.

No applicant shall commence construction of a facility at a site unless a petition for approval of construction of that facility has been approved by the board and, in the case of an electric or gas company which is required to file a long-range forecast pursuant to section sixty-nine I, that facility is consistent with the most recently approved long-range forecast for that company. In addition, no state agency shall issue a construction permit for any such facility unless the petition to construct such facility has been approved by the board and the facility conforms with any such long-range forecast.

No oil company shall commence construction of an oil facility unless a notice of intention to construct an oil facility, filed in accordance with this section, has been approved by the board as provided for in this section. In addition no state agency shall issue a construction permit for an oil facility unless the board has approved a notice of intention to construct such facility. Approval of such notice of intention to construct an oil facility shall not be considered approval of construction permits by state agencies.

A petition to construct a facility shall include, in such form and detail as the board shall from time to time prescribe, the following information: (1) a description of the facility, site and surrounding areas; (2) an analysis of the need for the facility, either within or outside, or both within and outside the commonwealth; (3) a description of the alternatives to the facility, such as other methods of transmitting or storing energy, other site locations, other sources of electrical power or gas, or a reduction of requirements through load management; and (4) a description of the environmental impacts of the facility. The board shall be empowered to issue and revise filing guidelines after public notice and a period for comment. A minimum of data shall be required by these guidelines from the applicant for review concerning land use impact, water resource impact, air quality impact, solid waste impact, radiation impact and noise impact.

The board shall conduct a public hearing on every petition to construct a facility or notice of intention to construct an oil facility within six months of the filing thereof. Such hearing shall be an adjudicatory proceeding under the provisions of chapter thirty A. In addition, a public hearing shall be held in each locality in which a facility would be located or in which an oil facility contained in a notice of intention to construct such facility is located, except that a public hearing shall not be required in a locality containing a proposed site if such a hearing has already been held in regard to that particular facility on that particular site in conjunction with a previously filed petition. The board shall within twelve months from the date of filing approve a petition to construct a facility or within twenty-four months from the date of filing a notice of intention to construct an oil facility for the refining of oil designed so that more than thirty-five per cent of its output could be gasoline or refined oil products lighter than gasoline, if it determines that it meets the following requirements: all information relating to current activities, environmental impacts, facilities agreements and energy policies as adopted by the commonwealth is substantially accurate and complete; projections of the demand for

electric power, or gas requirements and of the capacities for existing and proposed facilities are based on substantially accurate historical information and reasonable statistical projection methods and include an adequate consideration of conservation and load management; provided, however, that the department or board shall not require in any gas forecast or hearing conducted thereon the presentation of information relative to the demand for gas; projections relating to service area, facility use and pooling or sharing arrangements are consistent with such forecasts of other companies subject to this chapter as may have already been approved and reasonable projections of activities of other companies in the New England area; plans for expansion and construction of the applicant's new facilities are consistent with current health, environmental protection, and resource use and development policies as adopted by the commonwealth; and are consistent with the policies stated in section sixty-nine H to provide a necessary energy supply for the commonwealth with a minimum impact on the environment at lowest possible cost; and in the case of a notice of intent to construct an oil facility, that all information regarding sources of supply for such facility and financial information regarding the applicant and its proposed facility are substantially accurate and complete; that it is satisfied as to the adequacy of the applicant's capital investment plans to complete its facility; the long term economic viability of the facility; the overall financial soundness of the applicant; in the case of an oil facility, the qualification and capability of the applicant in the transshipment, transportation, storage, refining and marketing of oil or refined oil products; that plans including buffer zones or alternatives thereto for the applicant's new facility are consistent with current health, environmental protection and resource use and development policies as adopted by the commonwealth.

If the board determines the standards set forth above have not been met, it shall within twelve months of the date of filing reject in whole or in part the petition, setting forth in writing its reasons for such rejections, or approve the petition subject to stated conditions. In the event of rejection or conditioned approval, the applicant may within six months submit an amended petition. A public hearing on the amended petition shall be held on the same terms and conditions applicable to the original petition.

Not later than one year prior to commencement of construction of an oil facility, or not later than two years prior to the commencement of construction of a facility for the refining of oil designed so that more than thirty-five per cent of its output could be gasoline or refined oil products lighter than gasoline, a notice of intention to construct such facility shall be filed with the board. Such notice shall include in such form and detail as the board shall reasonably prescribe, in addition to a detailed description of the proposed facility and site, the following information for the region expected to be served by the oil facility:

(1) A description of the applicant's current activities involving the transshipment, transportation, storage, or refining of oil or refined oil products.

(2) A description of the applicant's qualification and capability in transshipment, transportation, storage, refining and marketing of oil or refined oil products.

(3) An analysis of the proposed facility including but not limited to the description of alternatives to the planned action, such as other site locations, other oil facilities, and no additional oil facilities; and a description of the environmental impact of the proposed facility, said description to include buffer zones and other measures to minimize damage to the environment. The board shall after public notice and a period for comment be empowered to issue and revise its own list of guidelines. A minimum of data shall be required by these guidelines from the applicant for review concerning land use impact, water resource impact, air quality impact, solid waste impact, radiation impact and noise impact.

(4) A description of proposed sources of supply of crude oil or refined oil products for the oil facility which is the subject of the notice; if such sources are persons not controlled by the applicant, certified copies of any contracts, letters of intent or any other understandings.

(5) A description of the capital investment plan proposed for such facility, and the overall financial soundness of the company and economic viability of the facility, including insurance coverage during construction and operation.

The authority of the board to conduct public hearings under the provisions of this section may be delegated in whole or in part to the employees of the department. Pursuant to the rules of the board, such employees shall report back to the board with recommended decisions for final action thereon.

The provisions of this section shall not apply in the case of a petition to construct a generating facility, which shall be subject to the provisions of section 69J1/4.

HISTORY: 1973, 1232, § 1; 1974, 852, § § 8, 9; 1975, 617, § 8; 1976, 468, § 5; 1979, 796, § 20; 1986, 466, § 2; 1992, 141, § 15; 1997, 164, § 209; 2004, 249, § 3, approved Aug 2, 2004, effective Oct 31, 2004.

PART I ADMINISTRATION OF THE GOVERNMENT
TITLE XXII CORPORATIONS
Chapter 164 Manufacture and Sale of Gas and Electricity
[ELECTRIC POWER FACILITIES SITING]

GO TO MASSACHUSETTS CODE ARCHIVE DIRECTORY

ALM GL ch. 164, § 69P (2005)

§ 69P. Judicial Review.

Any party in interest aggrieved by a decision of the board shall have a right to judicial review in the manner provided by section five of chapter twenty-five. The scope of such judicial review shall be limited to whether the decision of the board is in conformity with the constitution of the commonwealth and the constitution of the United States, was made in accordance with the procedures established under section sixty-nine H to section sixty-nine O and with the rules and regulations of the board with respect to such provisions, was supported by substantial evidence of record in the board's proceedings; and was arbitrary, capricious or an abuse of the board's discretion under the provisions of section sixty-nine H to section sixty-nine O.

HISTORY: 1973, 1232, § 1; 1992, 141, § § 35, 36.

LEXSTAT

ANNOTATED LAWS OF MASSACHUSETTS

*** THIS DOCUMENT IS CURRENT THROUGH THE 2005 LEGISLATIVE SESSION ***

PART I ADMINISTRATION OF THE GOVERNMENT
TITLE XXII CORPORATIONS
Chapter 164 Manufacture and Sale of Gas and Electricity
DISTRIBUTION OF GAS AND ELECTRICITY

GO TO MASSACHUSETTS CODE ARCHIVE DIRECTORY

ALM GL ch. 164, § 72 (2005)

§ 72. Taking Land for Transmission Lines.

(a) Any electric company, distribution company, generation company, or transmission company or any other entity providing or seeking to provide transmission service may petition the department for authority to construct and use or to continue to use as constructed or with altered construction a line for the transmission of electricity for distribution in some definite area or for supplying electricity to itself or to another electric company or to a municipal lighting plant for distribution and sale, or to a railroad, street railway or electric railroad, for the purpose of operating it, and shall represent that such line will or does serve the public convenience and is consistent with the public interest. The company shall forward at the time of filing such petition a copy thereof to each city and town within such area. The company shall file with such petition a general description of such transmission line and a map or plan showing the towns through which the line will or does pass and its general location. The company shall also furnish an estimate showing in reasonable detail the cost of the line and such additional maps and information as the department requires. The department, after notice and a public hearing in one or more of the towns affected, may determine that said line is necessary for the purpose alleged, and will serve the public convenience and is consistent with the public interest. If the electric company, distribution company, generation company or transmission company or any other entity providing or seeking to provide transmission service shall file with the department a map or plan of the transmission line showing the towns through which it will or does pass, the public ways, railroads, railways, navigable streams and tide waters in the town named in said petition which it will cross, and the extent to which it will be located upon private land or upon, under or along public ways and places, the department, after such notice as it may direct, shall give a public hearing or hearings in 1 or more of the towns through which the line passes or is intended to pass. The department may by order authorize an electric company, distribution company, generation company, or transmission company or any other entity to take by eminent domain under chapter 79 such lands, or such rights of way or widening thereof; or other easements therein necessary for the construction and use or continued use as constructed or with altered construction of such line along the route prescribed in the order of the department. The department shall transmit a certified copy of its order to the company and the clerk of each such town. The company may at any time before such hearings change or modify the whole or a part of the route of said line, either of its own motion or at the instance of the department or otherwise and, in such case, shall file with the department maps, plans and estimates as aforesaid showing such changes. If the department dismisses the petition at any stage in said proceedings, no further action shall be taken thereon, but the company may file a new petition after the expiration of a year from such dismissal. When a taking under this section is effected, the company may forthwith, except as hereinafter provided, proceed to erect, maintain and operate thereon said line. If the company shall not enter upon and construct such line upon the land so taken within one year thereafter, its right under such taking shall cease and determine. No lands or rights of way or other easements therein shall be taken by eminent domain under the provisions of this section in any public way, public place, park or reservation, or within the location of any railroad, electric railroad or street railway company except with the consent of such company and on such terms and conditions as it may impose or except as otherwise provided in this chapter; and no electricity shall be transmitted over

any land, right of way or other easement taken by eminent domain as herein provided until the electric company, distribution company, generation company, or transmission company or any other entity shall have acquired from the board of aldermen or selectmen or from such other authorities as may have jurisdiction all necessary rights in the public ways or public places in the town or towns, or in any park or reservation, through which the line will or does pass. No entity shall be authorized under this section or section 69R or section 24 of chapter 164A to take by eminent domain any lands or rights of way or other easements therein held by an electric company or transmission company to support an existing or proposed transmission line without the consent of the electric company or transmission company.

(b) [None.]

HISTORY: 1914, 742, § 128; 1917, 141; 1918, 91; 1924, 433; 1925, 98; 1926, 256; 1965, 457; 1978, 322, § 1; 2004, 249, § § 5-8, approved Aug 2, 2004, effective Oct 31, 2004.

LEXSTAT

*** THIS DOCUMENT IS CURRENT THROUGH THE 2005 LEGISLATIVE SESSION ***

PART I ADMINISTRATION OF THE GOVERNMENT
TITLE II EXECUTIVE AND ADMINISTRATIVE OFFICERS OF THE COMMONWEALTH
Chapter 25 Department of Public Utilities

GO TO MASSACHUSETTS CODE ARCHIVE DIRECTORY

ALM GL ch. 25, § 5 (2005)

§ 5. Rulings of Commission; Review; Enforcement of Orders.

When so requested by any party interested, the commission shall rule upon any question of substantive law properly arising in the course of any proceeding before the commission or any member or members thereof, and any party interested aggrieved by such ruling may object thereto, and may secure a review as hereinafter provided. Any failure or refusal of the commission to rule upon such question at or prior to the entry of a final order or decision shall be taken and recorded as a ruling adverse to the party requesting the ruling. An appeal as to matters of law from any final decision, order or ruling of the commission may be taken to the supreme judicial court by an aggrieved party in interest by the filing of a written petition praying that the order of the commission be modified or set aside in whole or in part.

Such petition for appeal shall be filed with the secretary of the commission within twenty days after the date of service of the decision, order or ruling of the commission, or within such further time as the commission may allow upon request filed prior to the expiration of the twenty days after the date of service of said decision, order or ruling. The commission shall serve such decision, order or ruling upon all parties in interest by mailing, postpaid, within one day of its being entered, and service shall be presumed to have occurred in the normal course of delivery of such mail. Within ten days after such petition has been filed, the appealing party shall enter the appeal in the supreme judicial court sitting in Suffolk county by filing a copy thereof with the clerk of said court, and shall file therewith a certificate that he is of the opinion that there is such probable ground for the appeal as to make it a fit subject for judicial inquiry and that it is not intended for delay; and double costs may be assessed by the court upon any such party whose petition shall appear to the court not to be a fit subject for judicial inquiry or shall appear to be intended for delay.

The record on appeal shall include one copy of the petition of the appellant or other original papers, and of the decision, order or ruling of the commission; and if and to the extent that either the commission or the appellant or any other party to the proceedings so requests within twenty days from filing the petition for appeal with the commission, it shall include one copy of the exhibits and documents introduced in the proceeding before the commission, of the official report of the proceedings and of the findings of fact of the commission. The secretary of the commission shall make an estimate of the expense of the preparation and transmission of the necessary papers and copies of papers aforesaid, and shall give the appellant notice in writing of the amount of such estimate. The appellant, within twenty days after the date of such notice from the secretary, shall pay to him the amount of such estimate and such further amount beyond such estimate as the secretary shall find to be then due for such preparation. The secretary then without delay shall prepare the papers and copies of papers aforesaid for transmission, and when they are ready shall give notice in writing of such fact to the appellant who, within five days after the date of such notice, shall pay to the secretary any balance then due therefor. The record on appeal shall then be certified to the supreme judicial court by the secretary of the commission. The commission or the supreme judicial court or any justice or judge thereof may for cause shown extend the time for doing any of the acts required by this paragraph. The supreme judicial court may order the transmission of the original or a copy of any paper not appearing in the record, or appearing therein in an abbreviated form, if at any time such omitted paper or any omitted part of such abbreviated paper becomes material.

Each claim of appeal shall set forth separately and particularly each error of law asserted to have been made by the commission. Upon the entry of the appeal it shall be heard and determined by the court, which shall have jurisdiction to affirm, modify or set aside such decision, order or ruling of the commission in whole or in part, or remand the proceeding to the commission with instructions subject to review by the full court upon appeal.

Any decision, order or ruling of the commission shall be effective and may be enforced according to its terms and the operation or enforcement thereof shall not be suspended or stayed by the entry of an appeal therefrom. The procedure before the court, except as otherwise set forth herein, shall be that prescribed by its rules, which shall state upon what terms the operation or enforcement of the decision, order or ruling shall be stayed. Any stock, bonds, debentures, convertible debentures, coupon notes, notes or other evidences of indebtedness issued pursuant to and in accordance with a decision, order, or ruling of the commission shall, if issued more than sixty days after the date of service of such decision, order or ruling, be valid and binding in accordance with their terms notwithstanding such decision, order or ruling of the commission is later modified or set aside in whole or in part unless the operation or enforcement of such decision, order or ruling has been suspended or stayed by the court prior to such issuance.

The burden of proof shall be upon the appealing party to show that the decision, order or ruling of the commission appealed from is invalid.

No evidence beyond that contained in the record shall be introduced before the court, except that in cases where issues of confiscation or of constitutional right are involved the court may order such additional evidence as it deems necessary for the determination of such issues to be taken before the commission and to be adduced at the hearing in such manner and upon such terms and conditions as to the court may seem proper. Whenever the court shall order additional evidence to be taken, the commission shall promptly hear and report such evidence to the court so that the proof may be brought as nearly as reasonably possible down to the date of its report thereof to the court. The commission may, after hearing such evidence, modify its findings as to facts and its original decision or orders by reason of the additional evidence so taken, and it shall file with the court such amended decision or orders and such modified or new findings. If the commission shall modify or amend its original decision or orders, the appealing party or any other party aggrieved by such modified or amended decision or order may file with the court, within such time as the court may allow, a specification of any errors of law claimed to have been made by the commission in such modified decision or orders, which specification of errors shall thereupon be considered by the court in addition to the errors of law asserted in the claim of appeal.

Any proceeding in any court in the commonwealth directly affecting an order of the commission, or to which it is a party, shall have preference over all other civil proceedings pending in such court, except election cases.

The supreme judicial court shall also have jurisdiction upon application of the commission to enforce all orders of the commission.

HISTORY: 1906, 433, § 7; 1913, 784, § § 27, 28; 1919, 350, § 121; 1953, 575, § 1; 1956, 190; 1971, 485; 1977, 621.

PART I ADMINISTRATION OF THE GOVERNMENT
TITLE III LAWS RELATING TO STATE OFFICERS
Chapter 30A State Administrative Procedure
[MASSACHUSETTS REGISTER AND CODE OF MASSACHUSETTS REGULATIONS]

GO TO MASSACHUSETTS CODE ARCHIVE DIRECTORY

ALM GL ch. 30A, § 11 (2005)

§ 11. Adjudicatory Proceedings; Conduct of Proceedings.

In addition to other requirements imposed by law and subject to the provisions of section ten, agencies shall conduct adjudicatory proceedings in compliance with the following requirements:-

(1) Reasonable notice of the hearing shall be accorded all parties and shall include statements of the time and place of the hearing. Parties shall have sufficient notice of the issues involved to afford them reasonable opportunity to prepare and present evidence and argument. If the issues cannot be fully stated in advance of the hearing, they shall be fully stated as soon as practicable. In all cases of delayed statement, or where subsequent amendment of the issues is necessary, sufficient time shall be allowed after full statement or amendment to afford all parties reasonable opportunity to prepare and present evidence and argument respecting the issues.

(2) Unless otherwise provided by any law, agencies need not observe the rules of evidence observed by courts, but shall observe the rules of privilege recognized by law. Evidence may be admitted and given probative effect only if it is the kind of evidence on which reasonable persons are accustomed to rely in the conduct of serious affairs. Agencies may exclude unduly repititious evidence, whether offered on direct examination or cross-examination of witnesses.

(3) Every party shall have the right to call and examine witnesses, to introduce exhibits, to cross-examine witnesses who testify, and to submit rebuttal evidence.

(4) All evidence, including any records, investigation reports, and documents in the possession of the agency of which it desires to avail itself as evidence in making a decision, shall be offered and made a part of the record in the proceeding, and no other factual information or evidence shall be considered, except as provided in paragraph (5) of this section. Documentary evidence may be received in evidence in the form of copies or excerpts, or by incorporation by reference.

(5) Agencies may take notice of any fact which may be judicially noticed by the courts, and in addition, may take notice of general, technical or scientific facts within their specialized knowledge. Parties shall be notified of the material so noticed, and they shall be afforded an opportunity to contest the facts so noticed. Agencies may utilize their experience, technical competence, and specialized knowledge in the evaluation of the evidence presented to them.

(6) Agencies shall make available an official record, which shall include testimony and exhibits, and which may be in narrative form, but the agency need not arrange to transcribe shorthand notes or sound recordings unless requested by a party. If so requested, the agency may, unless otherwise provided by any law, require the party to pay the reasonable costs of the transcript before the agency makes the transcript available to the party.

(7) If a majority of the officials of the agency who are to render the final decision have neither heard nor read the evidence, such decision, if adverse to any party other than the agency, shall be made only after (a) a tentative or pro-

posed decision is delivered or mailed to the parties containing a statement of reasons and including determination of each issue of fact or law necessary to the tentative or proposed decision; and (b) an opportunity is afforded each party adversely affected to file objections and to present argument, either orally or in writing as the agency may order, to a majority of the officials who are to render the final decision. The agency may by regulation provide that, unless parties make written request in advance for the tentative or proposed decision, the agency shall not be bound to comply with the procedures of this paragraph.

(8) Every agency decision shall be in writing or stated in the record. The decision shall be accompanied by a statement of reasons for the decision, including determination of each issue of fact or law necessary to the decision, unless the General Laws provide that the agency need not prepare such statement in the absence of a timely request to do so. Parties to the proceeding shall be notified in person or by mail of the decision; of their rights to review or appeal the decision within the agency or before the courts, as the case may be; and of the time limits on their rights to review or appeal. A copy of the decision and of the statement of reasons, if prepared, shall be delivered or mailed upon request to each party and to his attorney of record.

HISTORY: 1954, 681, § 1.

PART I ADMINISTRATION OF THE GOVERNMENT
TITLE III LAWS RELATING TO STATE OFFICERS
Chapter 30 General Provisions Relative to State Departments, Commissions, Officers and Employees
[DETERMINATION OF ENVIRONMENTAL IMPACT OF WORKS, PROJECTS OR ACTIVITIES CONDUCTED BY AGENCIES]

GO TO MASSACHUSETTS CODE ARCHIVE DIRECTORY

ALM GL ch. 30, § 61 (2005)

§ 61. Determination of Environmental Impact; "Damage to the Environment" Defined.

All agencies, departments, boards, commissions and authorities of the commonwealth shall review, evaluate, and determine the impact on the natural environment of all works, projects or activities conducted by them and shall use all practicable means and measures to minimize damage to the environment. Unless a clear contrary intent is manifested, all statutes shall be interpreted and administered so as to minimize and prevent damage to the environment. Any determination made by an agency of the commonwealth shall include a finding describing the environmental impact, if any, of the project and a finding that all feasible measures have been taken to avoid or minimize said impact.

As used in this section and section sixty-two, "damage to the environment" shall mean any destruction, damage or impairment, actual or probable, to any of the natural resources of the commonwealth and shall include but not be limited to air pollution, water pollution, improper sewage disposal, pesticide pollution, excessive noise, improper operation of dumping grounds, impairment and eutrophication of rivers, streams, flood plains, lakes, ponds, or other surface or subsurface water resources; destruction of seashores, dunes, marine resources, underwater archaeological resources, wetlands, open spaces, natural areas, parks, or historic districts or sites. Damage to the environment shall not be construed to include any insignificant damage to or impairment of such resources.

HISTORY: 1972, 781, § 2; 1973, 989, § 4.

TITLE 42. THE PUBLIC HEALTH AND WELFARE
CHAPTER 55. NATIONAL ENVIRONMENTAL POLICY

GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION

42 USCS § 4321

§ 4321. Congressional declaration of purpose

The purposes of this Act [42 USCS § § 4321 et seq.] are: To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.

HISTORY:
(Jan. 1, 1970, P.L. 91-190, § 2, 83 Stat. 852.)

TITLE 33. NAVIGATION AND NAVIGABLE WATERS
CHAPTER 9. PROTECTION OF NAVIGABLE WATERS AND OF HARBOR AND RIVER IMPROVEMENTS GENERALLY
IN GENERAL

GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION

33 USCS § 403

§ 403. Obstruction of navigable waters generally; wharves; piers, etc.; excavations and filling in

The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is hereby prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of War [Secretary of the Army]; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor of refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of War [Secretary of the Army] prior to beginning the same.

HISTORY:
(March 3, 1899, ch 425, § 10, 30 Stat. 1151.)

2 of 3 DOCUMENTS

THE COMMONWEALTH OF MASSACHUSETTS
ADVANCE LEGISLATIVE SERVICE

1997 REGULAR SESSION

CHAPTER 164

HOUSE BILL NO. 5117

1997 Mass. ALS 164; 1997 Mass. H.B. 5117

BILL TRACKING SUMMARY FOR THIS DOCUMENT

SYNOPSIS: AN ACT RELATIVE TO RESTRUCTURING THE ELECTRIC UTILITY INDUSTRY IN THE COMMONWEALTH, REGULATING THE PROVISION OF ELECTRICITY AND OTHER SERVICES, AND PROMOTING ENHANCED CONSUMER PROTECTIONS THEREIN.

To view the next section, type .np* and TRANSMIT.
To view a specific section, transmit p* and the section number. E.g. p*1

Whereas, The deferred operation of this act would tend to defeat its purpose, which is to establish forthwith a comprehensive framework for the restructuring of the electric utility industry, to establish consumer electricity rate savings by March 1, 1998, and to make certain other changes in law, necessary or appropriate to effectuate important public purposes, therefore it is hereby declared to he an emergency law, necessary for the immediate preservation of the public convenience....

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

[*1] SECTION 1. It is hereby found and declared that:

(a) electricity service is essential to the health and well-being of all residents of the commonwealth, to public safety, and to orderly and sustainable economic development;;

(c) ratepayers and the commonwealth will be best served by moving from (i) the regulatory framework extant on July 1, 1997, in which retail electricity service is provided principally by public utility corporations obligated to provide ultimate consumers in exclusive service territories with reliable electric service at regulated rates, to (ii) a framework under which competitive producers will supply electric power and customers will gain the right to choose their electric power supplier;;

(e) such extraordinary high electricity rates have created significant adverse effects on consumers and on the ability of businesses located in the commonwealth to compete in regional, national, and international markets;;

(g) competitive markets in generation should (i) provide electricity suppliers with the incentive to operate efficiently, (ii) open markets for new and improved technologies, (iii) provide electricity buyers and sellers with appropriate price signals, and (iv) improve public confidence in the electric utility industry;;

(i) it is vital that sufficient supplies of electric generation will be available to maintain the reliable service to the citizens and businesses of the commonwealth;;

(k) long-term rate reductions can be achieved most effectively by increasing competition and enabling broad consumer choice in generation service, thereby allowing market forces to play the principal role in determining the suppliers of generation for all customers;;

[*204] SECTION 204. Section 69H of said chapter 164, as so appearing, is hereby amended by striking out the first paragraph and inserting in place thereof the following paragraph:--

There is hereby established an energy facilities siting board within the department, but not under the supervision or control of the department. Said board shall implement the provisions contained in sections 69H to 69Q, inclusive, so as to provide a reliable energy supply for the commonwealth with a minimum impact on the environment at the lowest possible cost. To accomplish this, the board shall review the need for, cost of, and environmental impacts of transmission lines, natural gas pipelines, facilities for the manufacture and storage of gas, and oil facilities; provided, however, that the board shall review only the environmental impacts of generating facilities, consistent with the commonwealth's policy of allowing market forces to determine the need for and cost of such facilities. Such reviews shall be conducted consistent with section 69J for generating facilities and with section 69J 1/4 for all other facilities.

1 of 1 DOCUMENT

CODE OF MASSACHUSETTS REGULATIONS

*** THIS DOCUMENT REFLECTS ALL REGULATIONS IN EFFECT AS OF APRIL 21, 2006 ***

TITLE 980: ENERGY FACILITIES SITING COUNCIL
CHAPTER 1.00: RULES FOR THE CONDUCT OF ADJUDICATORY PROCEEDINGS

980 CMR 1.09 (2006)

1.09: Supplemental Procedures

(1) Re-opening Hearings. A party may, at any time before the Board renders a final decision, move that the hearing be reopened for the purpose of receiving new evidence. The motion should clearly show good cause for re-opening the hearing, state the nature and relevance of the evidence to be offered and explain why the evidence was unavailable at the time of the hearing.

(2) Consolidation. The Presiding Officer may order proceedings involving a common question of law or fact to be consolidated for hearing or decision on any or all of the matters at issue in such proceedings.

(3) Stipulations. At the discretion of the Presiding Officer, the parties may agree upon any fact or issue pertinent to the proceeding, either by filing a written stipulation at any point in the proceeding, or by making an oral stipulation at the hearing. In making findings, the Board need not be bound by any such stipulation.

(4) Technical Sessions. A technical session is an off-the-record meeting during which experts may provide detailed oral or written information in order to facilitate understanding of complex technical issues. The Presiding Officer may convene a technical session if he deems that such session would facilitate the conduct of the proceeding. The Presiding Officer shall permit representatives of the applicant, parties and limited participants to attend a technical session and shall make a reasonable effort to schedule and notice the time and place of any such session to permit attendance. In the absence of a stipulation to the contrary, statements made by any person during a technical session shall not be referred to or considered as evidence in the proceeding or in any subsequent proceeding. Board members, staff and parties may ask questions during a technical session.

(5) Subpoenas. The Presiding Officer may issue, vacate or modify subpoenas, in accordance with the provisions of *M.G.L. c. 30A, § 12.*

(6) Depositions. The Presiding Officer may at his discretion allow a deposition to be taken upon a showing that the person to be deposed cannot make an appearance at the hearing without substantial hardship and that the testimony being sought is significant, not privileged and not discoverable by an alternative means. If the Presiding Officer allows the taking of a deposition, the Presiding Officer shall specify the rules and procedures that will govern said deposition.

(7) Reconsideration. Any party may file a written motion requesting the Presiding Officer to reconsider a ruling as long as the motion is received within five days of the issuance of the ruling.

(8) Offers of Proof. Any offer of proof made in connection with an evidentiary ruling shall consist of a statement, which may be in writing, of the substance of the evidence the party making the offer contends would be adduced by such testimony. If the offer of proof consists of documentary evidence, a copy of the document shall be marked for identification and shall constitute the offer of proof.

(9) Site Visit of a Proposed Facility. The Board and staff may visit the proposed site and any alternative sites in order to facilitate an understanding of the pending matter. A site visit is for informational purposes only and shall not be considered as evidence in the proceeding.

(10) Production or View of Objects. Of his own accord, or upon the motion of a party, the Presiding Officer may order the production or view of any object which relates to the subject matter of a proceeding.

REGULATORY AUTHORITY

980 CMR 1.00: M.G.L. c. 164, § 69H.

SEC. 388. ALTERNATE ENERGY-RELATED USES ON THE OUTER CONTINENTAL SHELF.

(a) Amendment to Outer Continental Shelf Lands Act - Section 8 of the Outer Continental Shelf Lands Act (43 U.S.C. 1337) is amended by adding at the end the following:

(p) Leases, Easements, or Rights-of-way for Energy and Related Purposes-

(1) IN GENERAL- The Secretary, in consultation with the Secretary of the Department in which the Coast Guard is operating and other relevant departments and agencies of the Federal Government, may grant a lease, easement, or right-of-way on the outer Continental Shelf for activities not otherwise authorized in this Act , the Deepwater Port Act of 1974 (33 U.S.C. 1501 et seq.), the Ocean Thermal Energy Conversion Act of 1980 (42 U.S.C. 9101 et seq.), or other applicable law, if those activities--

(A) support exploration, development, production, or storage of oil or natural gas, except that a lease, easement, or right-of-way shall not be granted in an area in which oil and gas preleasing, leasing, and related activities are prohibited by a moratorium;

(B) support transportation of oil or natural gas, excluding shipping activities;

(C) produce or support production, transportation, or transmission of energy from sources other than oil and gas; or

(D) use, for energy -related purposes or for other authorized marine-related purposes, facilities currently or previously used for activities authorized under this Act, except that any oil and gas energy -related uses shall not be authorized in areas in which oil and gas preleasing, leasing, and related activities are prohibited by a moratorium.

(2) PAYMENTS AND REVENUES- (A) The Secretary shall establish royalties, fees, rentals, bonuses, or other payments to ensure a fair return to the United States for any lease, easement, or right-of-way granted under this subsection.

(B) The Secretary shall provide for the payment of 27 percent of the revenues received by the Federal Government as a result of payments under this section from projects that are located wholly or partially within the area extending three nautical miles seaward of State submerged lands. Payments shall be made based on a formula established by the Secretary by rulemaking no later than 180 days after the date of enactment of this section that provides for equitable distribution, based on proximity to the project, among coastal states that have a coastline that is located within 15 miles of the geographic center of the project.

(3) COMPETITIVE OR NONCOMPETITIVE BASIS- Except with respect to projects that meet the criteria established under section 388(d) of the Energy Policy Act of 2005, the Secretary shall issue a lease, easement, or right-of-way under paragraph (1) on a competitive basis unless the Secretary determines after public notice of a proposed lease, easement, or right-of-way that there is no competitive interest.

(4) REQUIREMENTS- The Secretary shall ensure that any activity under this subsection is carried out in a manner that provides for--

(A) safety;

(B) protection of the environment;

(C) prevention of waste;

(D) conservation of the natural resources of the outer Continental Shelf;

(E) coordination with relevant Federal agencies;

(F) protection of national security interests of the United States;

(G) protection of correlative rights in the outer Continental Shelf;

(H) a fair return to the United States for any lease, easement, or right-of-way under this subsection;

(I) prevention of interference with reasonable uses (as determined by the Secretary) of the exclusive economic zone, the high seas, and the territorial seas;

(J) consideration of--

(i) the location of, and any schedule relating to, a lease, easement, or right-of-way for an area of the outer Continental Shelf; and

(ii) any other use of the sea or seabed, including use for a fishery, a sealane, a potential site of a deepwater port, or navigation;

(K) public notice and comment on any proposal submitted for a lease, easement, or right-of-way under this subsection; and

(L) oversight, inspection, research, monitoring, and enforcement relating to a lease, easement, or right-of-way under this subsection.

(5) LEASE DURATION, SUSPENSION, AND CANCELLATION- The Secretary shall provide for the duration, issuance, transfer, renewal, suspension, and cancellation of a lease, easement, or right-of-way under this subsection.

(6) SECURITY- The Secretary shall require the holder of a lease, easement, or right-of-way granted under this subsection to--

(A) furnish a surety bond or other form of security, as prescribed by the Secretary;

(B) comply with such other requirements as the Secretary considers necessary to protect the interests of the public and the United States; and

(C) provide for the restoration of the lease, easement, or right-of-way.

(7) COORDINATION AND CONSULTATION WITH AFFECTED STATE AND LOCAL GOVERNMENTS- The Secretary shall provide for coordination and consultation with the Governor of any State or the executive of any local government that may be affected by a lease, easement, or right-of-way under this subsection.

(8) REGULATIONS- Not later than 270 days after the date of enactment of the Energy Policy Act of 2005, the Secretary, in consultation with the Secretary of Defense, the Secretary of the Department in which the Coast

Guard is operating, the Secretary of Commerce, heads of other relevant departments and agencies of the Federal Government, and the Governor of any affected State, shall issue any necessary regulations to carry out this subsection.

(9) EFFECT OF SUBSECTION- Nothing in this subsection displaces, supersedes, limits, or modifies the jurisdiction, responsibility, or authority of any Federal or State agency under any other Federal law.

(10) APPLICABILITY- This subsection does not apply to any area on the outer Continental Shelf within the exterior boundaries of any unit of the National Park System, National Wildlife Refuge System, or National Marine Sanctuary System, or any National Monument.'.

(b) Coordinated OCS Mapping Initiative-

(1) IN GENERAL- The Secretary of the Interior, in cooperation with the Secretary of Commerce, the Commandant of the Coast Guard, and the Secretary of Defense, shall establish an interagency comprehensive digital mapping initiative for the outer Continental Shelf to assist in decisionmaking relating to the siting of activities under subsection (p) of section 8 of the Outer Continental Shelf Lands Act (43 U.S.C. 1337) (as added by subsection (a)).

(2) USE OF DATA- The mapping initiative shall use, and develop procedures for accessing, data collected before the date on which the mapping initiative is established, to the maximum extent practicable.

(3) INCLUSIONS- Mapping carried out under the mapping initiative shall include an indication of the locations on the outer Continental Shelf of--

(A) Federally-permitted activities;

(B) obstructions to navigation;

(C) submerged cultural resources;

(D) undersea cables;

(E) offshore aquaculture projects; and

(F) any area designated for the purpose of safety, national security, environmental protection, or conservation and management of living marine resources.

(c) Conforming Amendment- Section 8 of the Outer Continental Shelf Lands Act (43 U.S.C. 1337) is amended by striking the section heading and inserting the following: `Leases, Easements, and Rights-of-way on the Outer Continental Shelf- '.

(d) Savings Provision- Nothing in the amendment made by subsection (a) requires the resubmittal of any document that was previously submitted or the reauthorization of any action that was previously authorized with respect to a project for which, before the date of enactment of this Act --

(1) an offshore test facility has been constructed; or

(2) a request for a proposal has been issued by a public authority.

(e) State Claims to Jurisdiction Over Submerged Lands- Nothing in this section shall be construed to alter, limit, or modify any claim of any State to any jurisdiction over, or any right, title, or interest in, any submerged lands.

SEC. 390. NEPA REVIEW.

(a) NEPA Review- Action by the Secretary of the Interior in managing the public lands, or the Secretary of Agriculture in managing National Forest System Lands, with respect to any of the activities described in subsection (b) shall be subject to a rebuttable presumption that the use of a categorical exclusion under the National Environmental Policy Act of 1969 (NEPA) would apply if the activity is conducted pursuant to the Mineral Leasing Act for the purpose of exploration or development of oil or gas.

(b) Activities Described- The activities referred to in subsection (a) are the following:

(1) Individual surface disturbances of less than 5 acres so long as the total surface disturbance on the lease is not greater than 150 acres and site-specific analysis in a document prepared pursuant to NEPA has been previously completed.

(2) Drilling an oil or gas well at a location or well pad site at which drilling has occurred previously within 5 years prior to the date of spudding the well.

(3) Drilling an oil or gas well within a developed field for which an approved land use plan or any environmental document prepared pursuant to NEPA analyzed such drilling as a reasonably foreseeable activity, so long as such plan or document was approved within 5 years prior to the date of spudding the well.

(4) Placement of a pipeline in an approved right-of-way corridor, so long as the corridor was approved within 5 years prior to the date of placement of the pipeline.

(5) Maintenance of a minor activity, other than any construction or major renovation or a building or facility.